

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	

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**DEFENDANT TYSON FOODS, INC.’S MOTION FOR PROTECTIVE  
ORDER WITH RESPECT TO STATE OF OKLAHOMA’S  
NOTICE OF DEPOSITION OF JOHN TYSON**

Defendant Tyson Foods, Inc. (“Tyson Foods” or the “Company”), respectfully moves this Court for a protective order with respect to State of Oklahoma’s Notice of Video Deposition of John Tyson. Plaintiffs have never sought to depose Mr. Tyson, who formerly served as CEO of Tyson Foods and now serves as Chairman of the Board of Directors, in the three and a half years since this case was filed. Rather, Plaintiffs scheduled this deposition for the very last day of the discovery period *only after* Tyson Foods sought to depose General Edmondson regarding his allegations about the *e. coli* outbreak at the Country Cottage restaurant. *See Defendant Tyson Foods, Inc.’s Motion To Modify February 26, 2007 Protective Order Prohibiting The Deposition Of Attorney General W.A. Drew Edmondson* (Dkt. #1921). This tit-for-tat deposition practice is contrary to this Court’s rulings—and the rulings of many other federal courts—that a company’s most senior executives are not subject to deposition absent special knowledge about the subject matter at issue. Mr. Tyson has no such special knowledge regarding the allegations of this case. Moreover, this Court denied Tyson Foods’ request to depose General Edmondson on the ground that General Edmondson’s factual statements about the Country Cottage outbreak are irrelevant

to this litigation. *See* 4/8/09, Minute Sheet [DKT # 1969]. Accordingly, Plaintiffs' attempt to match deposition for deposition is unnecessary and would waste the parties' resources at a critical time.

## **I. INTRODUCTION**

On March 23, 2009, Tyson Foods petitioned this Court for leave to depose General Edmondson. *See id.* On March 30, Plaintiffs provided notice of their intent to depose Mr. Tyson on April 16, 2009—the very last day of the discovery period. As Plaintiffs are well aware, employees serving in such senior executive positions within an organization are typically protected from being deposed absent a showing that the person has unique personal knowledge about the controversy. In fact, this Court had entered such a ruling in this very case. *See* 2/26/07 Opinion and Order [DKT # 1062], at 6.

To avoid Court involvement in this matter, counsel for Tyson Foods contacted Plaintiffs' counsel on April 1, to express Tyson Foods' concerns with this deposition notice. In that conversation, Plaintiffs were asked to provide an explanation as to unique personal knowledge and information relevant to the issues in this case they were seeking from Mr. Tyson. Plaintiffs were unable to provide this explanation, and further confirmed that the deposition notice was in no way prompted by Mr. Tyson being identified as a particularly knowledgeable witness on a topic in a deposition or by the identification of a particular document produced in this case uniquely associated with Mr. Tyson. Plaintiffs' only stated reason for this deposition is to question Mr. Tyson on the "policies" in place at Tyson Foods during his tenure as CEO. *See* Ex. 1, April 3, 2009 E-mail.

With this explanation, Plaintiffs ignore their previous wide-ranging 30(b)(6) notices issued to Tyson Foods relating to company policies. In response to these notices, Tyson Foods

made available its most knowledgeable company representatives on each of the issues Plaintiffs identified, and Plaintiffs had a full and fair opportunity to obtain all information and testimony it needed. Mr. Tyson has no unique personal knowledge beyond the testimony of the company representative that Plaintiffs have already deposed on the same topic, and thus there is no sufficient reason to conduct this deposition. *See Ex. 2, Aff. of John Tyson*. In light of Plaintiffs' timing, Tyson Foods must conclude that Plaintiffs merely intend to harass and burden Mr. Tyson.

## II. ARGUMENT

This Court has repeatedly ruled that corporate heads (commonly known as “apex” employees), like head government officials, are granted a degree of protection from discovery under the federal rules. This prevents the harassment associated with routinely subjecting such organization leaders to depositions in cases where they have no special knowledge beyond that available from other organization representatives. Absent a showing that the apex employee possesses unique personal knowledge regarding the controversy, the taking of his or her deposition is discouraged and may be prohibited by the Court.

Plaintiffs now seek to depose John Tyson regarding the “policies” in place during his tenure as CEO. Tyson Foods has previously made available knowledgeable representatives in response to Plaintiffs' wide-ranging 30(b)(6) notice regarding company policies. The knowledge gained through these depositions is equal to or greater than any information Plaintiffs seek from Mr. Tyson. Plaintiffs are unable to identify any unique personal knowledge to which Mr. Tyson could testify. Accordingly, this Court, under the authority found in Rule 26(c), should grant a protection order preventing Plaintiffs from proceeding with his deposition.

**A. Depositions of senior organization leaders are discouraged absent a showing of unique personal knowledge**

Plaintiffs and this Court are familiar with the standards covering the deposition of apex employees. In granting Plaintiffs' *Motion for a Protective Order Preventing the Deposition of Oklahoma Attorney General Drew Edmondson* (Dkt #1033), this Court noted that because the Attorney General serves as a senior government official, "some degree of protection may be necessary absent the necessity of discovering relevant factual information that is in the possession of that government individual." 2/26/07 Order at 6 (citing *Church of Scientology of Boston v. IRS*, 138 F.R.D. 9, 12 (D. Mass. 1990) ("In general heads of agencies and other top government executives are normally not subject to depositions.... An exception to this general rule exists concerning top officials who have direct personal factual information pertaining to material issues in the action.")). As this Court explained, "[t]his type of 'protection,' however, is not limited to the heads of government agencies. Corporate heads are similarly treated." 2/26/07 Order at 6 (citing *Evans v. Allstate Insurance Co.*, 216 F.R.D. 515 (N.D. Okla. 2003)). In *Evans*, Judge Joyner noted the well-established standards governing attempts to depose an organization's apex employees:

The law governing taking depositions of "apex" employees is well articulated in *Folwell v. Hernandez*, 210 F.R.D. 169 (M.D.N.C. 2002). In noting Sara lee Corporation's reliance on the decision in *Baine v. General Motors*, 141 F.R.D. 332 (M.D. Ala. 1991), the *Folwell* Court stated:

The *Baine* Court held that Rule 26(b) gives the court power to regulate harassing or burdensome depositions, and that unless a high level executive has unique personal knowledge about the controversy, the court should regulate the discovery process to avoid oppression, inconvenience, and burden to the corporations and to the executive....

....

Moreover, the oral deposition of a high level corporate executive should not be freely granted when the subject of the deposition will be only remotely relevant to the issues of the case.

See *Folwell*, 210 F.R.D. at 173-74 (citing *Harris v. Computer Assoc. Int'l Inc.*, 204 F.P.D. 44 (E.D.N.Y. 2001)).

*Evans*, 216 F.R.D. at 518-19.

In *Evans*, an insurance claim case, the plaintiffs sought to depose Allstate's Chief Executive Officer, Senior Vice President, and Chief Financial Officer, all of whom signed affidavits affirming that they had no unique personal knowledge regarding the controversy. *Id.* at 519. The plaintiffs claimed that these depositions were "necessary to prove their theory that a pervasive practice of inadequate supervision over Allstate claims adjusters exists within the corporation" despite having already deposed all of the adjusters and supervisors involved in handling the plaintiffs' claims. *Id.* This Court found that, "to the extent Plaintiffs have a right to pursue these issues, Allstate has already provided adequate information, or that the information can alternatively be obtained from other sources without deposing these 'apex' officers." *Id.*

Contrast *Evans* with *Zuniga v. Boeing Company*, 2007 WL 1072207 (N.D. Okla. Apr. 7, 2007), where Judge Joyner refused to extend these protections for apex employees to prevent the deposition of a former general manager of a Boeing facility. In *Zuniga*, the plaintiff had conducted a number of management depositions, but the plaintiff was able to point to testimony from one of those witnesses that the general manager had unique personal knowledge regarding a statistical analysis created by Boeing that was critical to the case. In light of this unique personal knowledge, this Court found his deposition was proper under Rule 26. *Id.* at \*3.

This Court is not alone in holding that apex employees are protected from the type of duplicative deposition that Plaintiffs seek in this case. To the contrary, a large number of federal and state courts have refused to allow parties to conduct unnecessary depositions of a company's

apex employees. *See, e.g., Thomas v. Int'l Bus. Machines*, 48 F.3d 478 (10th Cir. 1995); *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363 (Ct. App. 1992).

**B. John Tyson does not have unique personal knowledge regarding this controversy**

An application of these principles to this case make it clear that there are no grounds for overcoming the protection granted to Mr. Tyson as an “apex” official. As noted above, Mr. Tyson currently serves as Chairman of the Board and has previously served as the Chief Executive Officer of Tyson Foods. As this and many other courts have held, the fact that Mr. Tyson has held these high-level positions is insufficient to warrant his deposition. Rather, Plaintiffs must demonstrate that Mr. Tyson has some unique knowledge that they cannot obtain (and have not obtained) through another source at the Company.

Plaintiffs cannot meet this burden. To the extent Plaintiffs seek information regarding the policies in place during John Tyson’s tenure as CEO, there are other avenues in place to obtain this information, of which Plaintiffs have taken full advantage. On July 13, 2007, Plaintiffs served a wide-ranging 30(b)(6) notice on Tyson Foods with 36 separate areas of inquiry. *See* Ex. 3. On August 20, 2007, Tyson Foods produced a most knowledgeable representative on each of these issues and Plaintiffs conducted depositions of those individuals on their designated areas of knowledge. At the 30(b)(6) depositions, Plaintiffs examined at length the following six corporate representatives: Patrick Pilkington (currently V.P. of Government and Regulatory Affairs and formerly V.P. of Live Production Services for all Tyson poultry operations), Steve Patrick (Director of Environmental Health & Safety), Archie Schaffer (Sr. V.P. Government Affairs), Read Hudson (V.P. & Associate General Counsel), Leasea Butler (Director of Product for all Cobb-Vantress poultry operations) and Dr. Chet Wiernusz (World Technical Services

Representative for Cobb-Vantress). In the year and a half that has followed, Plaintiffs have not challenged these designations, sought additional discovery on these issues, or provided subsequent 30(b)(6) notices on additional areas of inquiry.

Tyson Foods is a large company with numerous departments and locations across the country. It follows that the most knowledgeable persons regarding these policies are those individuals directly involved in the area of inquiry, not the CEO. The Company has made those individuals available to the Plaintiffs. During Tyson Foods' attempt to resolve this present controversy without Court involvement, Plaintiffs were unable to point to one fact or statement, be it from a document produced by Tyson Foods or a statement given by a Tyson representative, indicating that John Tyson has unique personal knowledge regarding this lawsuit that is in any way different from the evidence to which they have had access for several years. *See* Ex. 1. In sum, this notice of deposition is merely for purposes of harassment.

**C. Plaintiffs delay in giving notice unduly burdens Tyson Foods**

Under Rule 26(c), the Court may, for good cause shown, issue an order preventing a party from taking a deposition to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. In addition to the reasons stemming from Mr. Tyson's lack of unique personal knowledge and status as a high executive official, this Court should enter a protective order due to Plaintiffs' delay in filing this notice of deposition. Mr. Tyson's relationship with Tyson Foods is obviously not a new development recently learned by Plaintiffs. Mr. Tyson served as the Company's CEO from 1999 to 2006, well after Plaintiffs filed this lawsuit. He has continued in his role as Chairman of the Board of Directors since 2006. Plaintiffs have chosen not to depose Mr. Tyson for over three and half years since filing this lawsuit. Moreover, as noted above, over a year and a half has passed since Tyson Foods



identified its representatives in response to Plaintiffs' 30(b)(6) requests involving the "policies" in place at Tyson Foods. Then, on March 30, 2009, less than three weeks from the discovery deadline, Plaintiffs filed a notice of deposition without any discussion with Tyson Foods or any attempt to calendar. As the Court knows from the recent motions, the parties have agreed to schedule numerous depositions in the last few weeks of discovery. The vast majority of these agreed-upon depositions were scheduled during this limited timeframe because the parties only recently exchanged their final witness lists. Neither Tyson Foods nor any other Defendant has included John Tyson on its witness lists.

Plaintiffs' attempt to unilaterally add Mr. Tyson on the very last day (after years of delay) can only be interpreted as an unreasonable attempt to harass and burden Tyson Foods during this hectic close to the discovery period. The Tenth Circuit has noted that the last-minute nature of a request for an apex employee should be taken into account by a court in deciding whether to disallow the deposition. This is particularly true where, as here, the party seeking the deposition is unable to offer an explanation as to why the apex official's testimony is needed at the last moment. *See Thomas v. International Business Machines*, 48 F.3d 478 (10th Cir. 1995) (noting the burden placed on an apex official by an "11th hour" request for a deposition without a valid explanation).

Because they are unable to explain the catalyst for this sudden deposition notice, the only explanation for Plaintiffs' actions is that they are attempting to harass and burden Tyson Foods. As was conveyed to Plaintiffs' counsel, due to pre-existing commitments by Mr. Tyson and the numerous agreed depositions that are pending for counsel, there are no dates prior to the April 16 discovery deadline when both Defendants' counsel and Mr. Tyson are available for his



deposition. It simply cannot be done during this time frame. But even if it could be scheduled, the above-cited cases make clear that this deposition should not occur.

### III. CONCLUSION

For these reasons, Tyson Foods respectfully asks this Court to grant a protective order preventing Plaintiffs from taking the deposition of John Tyson.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 13th day of April 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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